

Revisiting the Presumption of Jointly Placing Siblings in Foster Care

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I. INTRODUCTION

Until fairly recently, it was assumed that when parents divorced and custody was being assigned, it was in the child's best interest to be placed with the mother.¹ It took time and some tragic and avoidable situations to inform policy makers that this blanket assumption should be rebuttable—if a presumption at all. We have now come to a similar crossroad involving the placement of children in foster care. There is a presumption in law and policy that it is in the best interest of children going into foster care that they be placed together with their siblings. We address the strength of this assumption and propose that, while children may have sibling relationships lasting longer than relationships with partners, parents, or children,² the presumption that keeping siblings together is always best should be carefully evaluated to take individual circumstances into consideration. Rivalry and violence between siblings are unfortunate realities that must be

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¹ A popular basis cited for this presumption was known as the “tender years” doctrine. See, e.g., Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 112–13 (1987). See also remarks of the Supreme Court of New York, Appellate Division: “[t]he child at tender age is entitled to have such care, love, and discipline as only a good and devoted mother can usually give.” *Ullman v. Ullman*, 135 N.Y.S. 1080, 1083 (N.Y. App. Div. 1912).

² D. Hindle, *Clinical Research: A Psychotherapeutic Assessment Model for Siblings in Care*, 33 JOURNAL OF CHILD PSYCHOTHERAPY 71 (2007).

considered when determining what would truly be in the best interest of the children.

We begin by presenting an overview of the scope and magnitude of the issue. Following this introduction, we provide an overview of states' laws and policies concerning the placement of siblings in foster care. This is followed by a review of relevant federal laws and programs, followed by a brief case study and analysis. The last section of this article reviews some recent studies and theories that can help inform practitioners in the child welfare system.

In the United States, the proportion of children that did not live with two married parents in 2012 was 36 percent.³ An estimated 424,000 children were living in foster care in the last quarter of 2009.⁴ Further, an estimated two-thirds of children in out-of-home care have siblings,⁵ and of those, 30 percent entering foster care have four or more siblings.⁶

“The majority of child welfare professionals strongly support the idea that keeping siblings together is in their best interest, in most circumstances[,]”⁷ and have historically advocated placing them together.⁸

³ FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, *America's Children: Key National Indicators of Well-being, 2013; Family Structure and Children's Living Arrangements*, available at <http://www.childstats.gov/americaschildren/famsoc1.asp>.

⁴ This was a decrease from the 544,000 children in foster care on September 30, 2000. See Child Trends, Foster Care Data Snapshot, 2011, available at http://www.childtrends.org/Files/Child_Trends_2011_05_31_DS_FosterCare.pdf.

⁵ Adam McCormick, *Siblings in Foster Care: An Overview of Research, Policy, and Practice*, 4 JOURNAL OF PUBLIC CHILD WELFARE 198, 198 (2010) (citing Casey Family Programs National Center for Resource Family Support, *Siblings in Out-of-Home Care: An Overview*, 2003, available at http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/sibling_overview.pdf).

⁶ David J. Herring, *Foster Care Placement: Reducing the Risk of Sibling Incest*, (University of Pittsburgh Working Paper Series, Working Paper No. 6, 2004), available at <http://law.bepress.com/pittlwps/art6>.

⁷ McCormick, *supra* note 5, at 199.

⁸ David J. Whelan, *Using Attachment Theory When Placing Siblings in Foster Care*, 20 CHILD & ADOLESCENT SOC. WORK J. 1, 21, 21 (2003). See also Rebecca L. Hegar,

There are surely benefits in many cases to placing siblings together. When early sibling bonds are positive, they then can serve as foundations for later relationships.⁹ Siblings who have been placed together in foster homes were reported to have fewer emotional and behavioral problems than those who were placed alone,¹⁰ and studies have shown that siblings placed together stay in one placement longer and experience fewer moves in the foster care system.¹¹ As discussed in the cases and policies section of this article, other reasons for keeping siblings together include maintaining attachment to and connectedness with family members, the preference of the children, emotional support, strong ties that may have developed due to shared experiences in a dysfunctional home, and the ease of visitation with birth parents.¹²

However, other considerations should equally play a role in the determination of whether siblings should be placed together. Sometimes there are factors at play that have more to do with the process than the children themselves.¹³ Some such factors preventing the placement of siblings together include a lack of resources, a large number of cases per caseworker, and the need to quickly find appropriate placements for children whose families have entered a period of crisis.¹⁴ Also, there is the constant challenge of finding an adequate number of foster parents.¹⁵ When

Sibling Relationships and Separations: Implications for Child Placement, 62 SOC. SERV. REV. 446–67 (1988).

⁹ McCormick, *supra* note 5, at 200.

¹⁰ Whelan, *supra* note 8, at 21.

¹¹ *Id.*

¹² Kristine Schuerger, Nat'l Resource Center for Foster Care & Permanency Planning, Information Packet: Siblings in Foster Care, 2002, available at http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/information_packets/siblings-pkt.pdf.

¹³ See M.A. Herrick, W. Piccus, *Sibling connections: The importance of nurturing sibling bonds in the foster care system*, CHILD. & YOUTH SERVICES REV. 27 (2005) 845–861, at 846 [internal citations omitted throughout].

¹⁴ *Id.*

¹⁵ Herring, *supra* note 6, at 1168.

sibling sets are large it is often difficult to find available foster homes that are large enough,¹⁶ and it may be more important to get the children placed in a safe and secure setting rather than delaying a placement in order to keep the sibling set together.

There is little consensus concerning the advantages or disadvantages of keeping sibling sets together in foster care placements. One study author reported that “[o]f children who enter foster care, research into placement outcome reports comparatively favorable adjustment for those placed with siblings.”¹⁷ Another article reports that children placed with siblings displayed fewer behavioral problems and had fewer previous placements.¹⁸ Even though research has found that relationships with brothers and sisters are often highly valued, a review of research for its guidance on fostering did not find conclusive evidence that placing siblings together improves their outcomes during or after placement.¹⁹ And a psychotherapist reported that foster children separated from their siblings exhibited fewer psychological symptoms in placement and that separated siblings had better school performance.²⁰ Further, he noted that other researchers reported that foster mothers perceived foster children in sibling groups as having more difficulty adjusting to a new foster placement than single foster children separated from their siblings.²¹ Other potential disadvantages for the insistence on maintaining sibling groups include placement difficulties, lack

¹⁶ Whelan, *supra* note 8, at 22; and Sylvie Drapeau, Marie Simard, Madeleine Beaudry & Cecile Charbonneau, *Siblings in Family Transitions*, 49 FAMILY RELATIONS, 77, 83 (2000) (internal citations omitted).

¹⁷ Rebecca L. Hegar, *Sibling Relationships and Separations: Implications for Child Placement*, 62 SOC. SERV. REV. 446, 460 (1988).

¹⁸ Drapeau et al. *supra* note 16, at 78.

¹⁹ *Placing Siblings in Foster Care*, COMMUNITY CARE, 19 July, 2007, available at http://www.communitycare.co.uk/2007/07/18/placing-siblings-in-foster-care/#.UoGKSiiLN_0.

²⁰ Whelan, *supra* note 8, at 22.

²¹ *Id.*

of resources, lack of foster families prepared to take large sibling sets, and conflict between the siblings.²²

With respect to the children, broad age ranges can make it difficult to meet the children's disparate needs in the same setting, and strong sibling rivalry can make siblings too difficult to manage in one placement.²³ Further, it has been reported that sibling separation could in fact lead to improved sibling relationships in certain cases.²⁴ Separation has been shown to ease conflict and sibling rivalry between children, while visitation allows for increased positive interactions.²⁵ It is also beneficial for the siblings to be placed separately when one or more of them have special needs.²⁶ Siblings placed together can reinforce behavioral problems that are used as coping mechanisms in an abusive home.²⁷ It is often easier to place individual children for adoption than to search for a home that will take the entire sibling group, which delays permanency for each child²⁸ and works to the detriment of the siblings in the long run. In situations where siblings are raised in separate households, they may not know of their brothers or sisters.²⁹ Thus, prioritizing joint placement based on a theory of maintaining close sibling relationships may not be rationally based, and it is sometimes the children themselves who request separation.³⁰ Other situations where separation should be considered include instances of violent behavior—

²² See Hindle, *supra* note 2, at 72.

²³ Whelan, *supra* note 8, at 22.

²⁴ Drapeau et al., *supra* note 16, at 78.

²⁵ See Drapeau et al., *supra* note 16.

²⁶ Drapeau et al., *supra* note 16, at 83.

²⁷ See Hindle, *supra* note 2.

²⁸ Schuerger, *supra* note 12 (citing the Casey Family Programs National Center for Resource Family Support, Siblings in Out-of-Home Care: An Overview, 2003, available at http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/sibling_overview.pdf).

²⁹ *Id.* (citing the Casey Family Programs/National Center for Resource Family Support).

³⁰ Drapeau et al. *supra* note 16, at 83. One study found that teenagers placed in foster care more often expressed the wish to be separated from their siblings than did younger children. "Both caseworkers and teenagers considered that daily contact between siblings is less essential during the teenage years" *Id.* at 77, 83.

which may include emotional, physical, or sexual abuse—occurring within the sibling set. This will be explored in more depth later in this article.

II. OVERVIEW OF STATES' POLICIES

While there is great variety in how the states create policies on siblings in foster care, it is common for state child welfare agencies to have policies that require consideration of sibling placement and to compel them to strive for the maintenance of sibling contact, even when children are placed separately.³¹ Approximately half of the states in the United States have enacted policies regarding siblings in foster care,³² with some requiring post-placement visits with siblings. The prevailing professional opinion endorses the idea that keeping sibling groups together is in the children's best interest, "unless it would compromise the safety or well-being of one or more children."³³

"Most states have statutory and regulatory provisions, and often child welfare policies, requiring that children be placed together if possible, and if not, mandating, or strongly encouraging, that the children have regular contact."³⁴ However, while "child welfare laws and policies have long encouraged the placement of siblings together, practice reveals different results. Only about 40 percent of these children are placed with a sibling, and often visitation between siblings, placed separately while they are in foster care, is not maintained on a regular basis."³⁵ There is such a strong presumption that siblings should be placed together, "[e]xperts in the field generally agree that there is only one valid child-centered reason for

³¹ See Herrick & Piccus, *supra* note 13.

³² *Id.* at 856.

³³ *Id.* at 846.

³⁴ Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption*, 41 N. M. L. REV. 1, 12 (2011).

³⁵ *Id.* at 6.

separating siblings early in foster placement – that one child poses a significant threat to the safety or well-being of another sibling(s).³⁶ The presumption that siblings should always be kept together is so strong that some do not think that even abuse and threat is enough to justify separating siblings. “Removing an abusive sibling does not stop the behavior, it only changes the identity of the victim; all siblings may benefit from therapy and staying together.”³⁷

An overview of states reveals that, while many do not legally mandate keeping siblings together in foster care, state policies have articulated a strong preference to do so. For example, six states require monthly sibling visits, five states require biweekly visits, and two states require weekly visits.³⁸

There is no consensus among experts on how states react to challenges involving sibling placements. One author claims that arguments made in courts to preserve the sibling relationship are not usually successful,³⁹ while another reports in a review of court cases on the legal right of siblings to be placed together, “courts are largely sympathetic to siblings’ claims for placement together, sometimes expressly requiring state actors to establish compelling reasons to separate siblings, but the courts do not view siblings’ claims as absolute or guaranteed.”⁴⁰

The National Resource Center for Foster Care & Permanency Planning (NRCFCPP)⁴¹ provided a list of states that address sibling placement in their policy. Of these, 13 states provide specific reasons that are considered acceptable for separating siblings; two states (MN and OK) list reasons

³⁶ *Id.* at fn. 21 (internal citations omitted).

³⁷ Schuerger, *supra* note 12, at 3.

³⁸ Mandelbaum, *supra* note 34.

³⁹ *Id.* at 23.

⁴⁰ Herring, *supra* note 6, at 1167.

⁴¹ NATIONAL RESOURCE CENTER FOR PERMANENCY & FAMILY CONNECTIONS, as of December 28, 2005. The NRCFPC provides many resources on its website at <http://www.nrcpfc.org/>.

considered *not* acceptable in the continued separation of siblings; seven states (ID, IO, KY, LA, ME, MN, and WV) address issues of sibling violence, sexual abuse, or incest; and three states (AR, KY, and NY) require that a qualified professional make the determination that separation is in the children's best interest.⁴²

Several states (AL, AZ, DC, MA, MT, NH, NV, ND, PA, SC, SD, TN, and VT), and Washington, DC, are silent regarding the issue of sibling placement. Most states adopt the presumption that siblings should be kept together, but allow for cause to be shown where this presumption should or should not be followed (AK, AR, CA⁴³, CO, CT, GA, HI, ID, IL⁴⁴, IN, IA⁴⁵,

⁴² *Id.*

⁴³ A recent case in California, *In re A.S.*, involved a suit where a mother challenged an order permitting separate foster care placements for her children. *In re A.S.*, 141 Cal. Rptr. 3d 255, 261 (Cal. Ct. App. 2012). In the case, siblings aged seven and ten, were dependents of the juvenile court system for over four years. *Id.* at 257–58. Their permanent plan was to enter long-term foster care, but because of their behavioral problems, they could not be placed. *Id.* at 257. The Orange County Social Services Agency determined that the siblings had a better chance of long-term foster care if they were placed separately. *Id.* After a hearing, the juvenile court rescinded its earlier order requiring that the children be placed together, relying on therapeutic specialists who determined that it was in the children's best interest to try to secure separate foster placements for them. *Id.* at 259. California law requires that siblings removed from their home and placed in foster care be placed together “unless it has been determined that placement together is contrary to the safety or well-being of any sibling.” CAL. WELF. & INST. CODE § 16002(a) (West 2012). That same statute requires that the responsible agency make a “diligent effort” to place siblings in the same foster care placement, but also requires that when this is not possible, “ongoing and frequent interaction among siblings” must be facilitated. CAL. WELF. & INST. CODE § 16002(b) (West 2012). The court-appointed special advocate reported that the children “feed off each other” by antagonizing each other. *In re A.S.*, at 258. Further, the children agreed to be placed separately. *Id.* at 259. The court affirmed that the children could, and should, be placed separately, holding that “[p]lacement decisions in dependency proceedings are ‘committed to the sound discretion of the juvenile court, and the trial court’s ruling should not be disturbed on appeal unless an abuse of discretion is clearly established.’” *Id.* at 261 (quoting *In re Stephanie M.* 867 P.2d 706, 718 (Cal. 1994).

⁴⁴ Herring, *supra* note 6, at 1165. The Illinois Department of Children and Families requires at least twice monthly visits between siblings in separate foster home, except in special circumstances. *Id.*

KY, ME, MI, MN, NY, NC, OH, OK, OR, RI, VA⁴⁶, and WA).⁴⁷ Three states (TX⁴⁸, MD⁴⁹, and LA⁵⁰) do not have a presumption regarding sibling placement, while five (DE, KS, MO, UT, and WV) do not permit questioning or overruling the presumption that siblings should always be kept together.⁵¹

Several states, including California, Ohio, Massachusetts, and New York, have mandates that child welfare agencies place siblings together.⁵² There

⁴⁵ Iowa requires that the state “make a reasonable effort to place the child and siblings together in the same placement.” (IOWA CODE § 232.108(1) (2007)). If the siblings are not placed together, the state shall explain why and facilitate visitation. IOWA DEPARTMENT OF HUMAN SERVICES CHILD WELFARE MODEL OF PRACTICE, 2007, available at http://www.dhs.state.ia.us/docs/CW_Model_of_Practice.pdf.

⁴⁶ “All reasonable steps” need to be taken to place siblings together and if not, then to “develop a plan to encourage frequent and regular visitation or communication between the siblings.” (VA. CODE ANN. § 63.2-900.2 (West 2008)).

⁴⁷ NAT’L RESOURCE CTR FOR FAMILY-CENTERED PRACTICE & PERMANENCY PLANNING, POLICIES ON PLACING SIBLINGS IN OUT OF HOME CARE (2005) available at http://www.hunter.cuny.edu/socwork/nrfcftp/downloads/policy-issues/Sibling_Placement_Policies.pdf.

⁴⁸ Siblings who are separated because of actions taken by the child protection agency can petition for access to their siblings, which will be granted if it is found to be in the best interest of the children. (TEX. FAM. CODE ANN. § 153.551 (West 2009)).

⁴⁹ Like Texas, Maryland law contains a provision in which siblings who are separated in foster care placements may petition the court for reasonable sibling visitation rights. (MD. CODE ANN., FAM. LAW § 5-525.2(b)(1) (West 2005)).

⁵⁰ The best interests and special needs of the child should be considered when selecting a placement. In selecting a home for a child, there are other factors to consider, such as the child’s age, stage of development, any special needs or problems the child may have, health and schooling needs, as well as *whether he or she has siblings who should or should not be placed in the same home*. These factors should then be compared with the available foster homes capable of meeting those specified needs. The final step is to determine which of the currently available foster homes are most appropriate for the child. (emphasis added). LOUISIANA OFFICE OF COMMUNITY SERVICE, THE FOSTER PARENT HANDBOOK FOR THE FOSTER AND ADOPTIVE FAMILIES OF LOUISIANA (2009) available at <http://www.dss.state.la.us/assets/docs/searchable/OCS/fosterParenting/FosterParentHandbook0409.pdf>.

⁵¹ NAT’L RESOURCE CENTER FOR FAMILY-CENTERED PRACTICE & PERMANENCY PLANNING, *supra* note 47.

⁵² Herring, *supra* note 6, at 1166.

are often strong presumptions that the best interest of the children will be served through reunification with the birth family.⁵³

A demonstration of the presumption of keeping siblings together can be found in New York, where, according to the law and regulations, siblings should not be unnecessarily separated in their foster care placement unless it is determined that placement together would not be in the best interests of the siblings.⁵⁴ There is also a requirement that the agencies overseeing the placements must make diligent efforts to facilitate biweekly contact among separated siblings, thus reinforcing the notion that contact with siblings is always in the child's best interest.⁵⁵ Yet, New York recognizes that this presumption is rebuttable by allowing phone contact or not requiring contact if it would be contrary to the health, safety, or welfare of one or more of the siblings.⁵⁶

New York requires that siblings may only be separated after consultation with or evaluation by professional staff, such as a licensed psychologist, psychiatrist, physician, or certified social worker.⁵⁷ New York's framework

⁵³ In the Mississippi Code of 1972 (as amended):

A decision to place a child in foster care or relative care shall be made with consideration of the child's health, safety and best interests...The department shall adopt rules addressing concurrent planning for reunification and a permanent living arrangement. The department shall consider the following factors when determining appropriateness of concurrent planning:

- (a) The likelihood of prompt reunification;
- (b) The past history of the family; ...
- (h) Placement of siblings

MISS. CODE ANN. § 43-15-13 (2008).

⁵⁴ OFFICE OF THE N.Y. STATE COMPTROLLER, DIVISION OF STATE GOV'T ACCOUNTABILITY, OFFICE OF CHILDREN AND FAMILY SERVICES, SIBLING PLACEMENT IN FOSTER CARE, REPORT 2007-S-10, 2007, *available at* <http://www.osc.state.ny.us/audits/allaudits/093008/07s10.pdf>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

explicitly describes factors that should be considered when making the decision to separate siblings, which include but are not limited to the following: age differences of the siblings; the health and developmental differences among the siblings; the emotional relationship between the siblings; the siblings' individual needs; and the attachment of the individual siblings to separate families or locations.⁵⁸

Six states (including CA and NJ⁵⁹) have a "Bill of Rights" for children in foster care, which includes the right to maintain contact between siblings.⁶⁰ Florida is similar, but it sets out goals rather than rights.⁶¹ Interestingly, the Supreme Court of New Jersey ruled that "siblings can petition for visitation with their brothers and sisters who have been adopted by non-relatives, subject to the avoidance of harm standard."⁶² The court noted, however, that "the sibling 'bear[s] the burden of establishing by a preponderance of the evidence that visitation is necessary to avoid harm to the child.'"⁶³ California (State Assembly Bills AB 740 and AB 1987) requires that sibling relationships be preserved and that the siblings always be considered during

⁵⁸ *Id.* at 4. It should be noted that the inability to find foster parents willing to accept the large number of siblings in a group was not considered a valid reason for separating siblings because placing them together would not be contrary to the health, safety or welfare of one or more of the children. *Id.* at 4–5. However, it could be argued that keeping the children in temporary care could be contrary to a child's welfare if the siblings had a psychologically or physically damaging relationship.

⁵⁹ Mandelbaum, *supra* note 35, at 14 (citing CAL. WELF. & INST. CODE § 16001.9(a)(7) (West 2009); N.J. STAT. ANN. § 9:6B-4 (West 1991)). New Jersey's child welfare agency has an affirmative duty to reserve the sibling relationship. Mandelbaum, *supra* note 35, at 14 (citing N.J. STAT. ANN. § 9:6B-4(d), (f) (West 1991)).

⁶⁰ Mandelbaum, *supra* note 34 (citing ARIZ. REV. STAT. ANN. § 8-529 (2009); ARK. CODE ANN. § 9-28-1003 (2007); CAL. WELF. & INST. CODE § 16001.9(a)(7) (West 2009); CONN. GEN. STAT. § 17a-16 (2006); N.J. STAT. ANN. § 9:6B-4 (West 1991); R.I. GEN. LAWS § 42-72-15 (1991)).

⁶¹ Mandelbaum, *supra* note 34 (citing FLA. STAT. § 39.4085 (2010)).

⁶² *Id.* at 18 (quoting *In re D.C. & D.C.*, 4 A.3d 1004, 1021 (N.J. 2010)).

⁶³ *Id.* at n. 68 (quoting *In re D.C. & D.C.*, 4 A.3d 1004, 1021 (N.J. 2010) (alternation in original) (quoting *Moriarty v. Bradt*, 827 A.2d 203, 223 (N.J. 2003)).

decision-making.⁶⁴ The bills mandate agencies to make reasonable efforts to place siblings together.

Alabama has a “Foster Parents’ Bill of Rights” requiring that records be kept concerning children in the foster care system, including those records pertaining to behavioral problems, health history, educational status, and cultural and family backgrounds.⁶⁵ These records are made available to potential foster parents without a specific request for their disclosure. A Maryland regulation provides foster parents a right to receive such information, but not necessarily a right to receive such information prior to the placement of foster children with them.⁶⁶

California’s sibling legislation is detailed, but it is missing some significant provisions, such as consideration of the nature of the siblings’ relationships in determining a child’s best interest or addressing the right to sibling contact when brothers and sisters are placed separately.⁶⁷ California, New York, and Illinois, which together have more than one-third of the nation’s foster children, are considered by one author “to have the most progressive legislation concerning siblings in foster care.”⁶⁸ He sees “progressiveness” in the fact that California “leads the nation in legislative efforts to preserve foster children’s sibling relationships.”⁶⁹ For example, the California code attempts to ensure that siblings are placed together in

⁶⁴ Aron Shlonsky, Daniel Webster, & Barbara Needell, *The Ties that Bind: A Cross-Sectional Analysis of Siblings in Foster Care*, 29(3) J. OF SOC. SERVICE RES. 27, 29 (2003).

⁶⁵ *Foster Parents’ Bill of Rights*, AFAPA.ORG, <http://www.afapa.org/id2.html>.

⁶⁶ Daniel Pollack, *Advantages of Proactively Sharing Information with Foster Parents*, 70 POL’Y & PRAC. 31, 31 (quoting Md. Code. Regs. reg. no. 07.02.25.07-1(A) (2013) available at <http://www.dsd.state.md.us/comar/getfile.aspx?file=07.02.25.07-1.htm>).

⁶⁷ Herrick & Piccus, *supra* note 13, at 856.

⁶⁸ McCormick, *supra* note 5, at 203.

⁶⁹ *Id.*

foster care regardless of whether they were removed from their home at the same time or at different times.⁷⁰

The New England Youth Coalition (NEYC), who represents youth in foster care, demonstrated another example of the unwavering conviction that placement with siblings is always the best course of action. NEYC, along with the New England Association of Child Welfare Commissioners and Directors, created a regional Siblings Bill of Rights intended to preserve sibling relationships between children under the care of New England child welfare agencies.⁷¹ It outlines ten basic rights for foster children, starting with the idea that each foster child should be placed with her or his siblings.⁷²

We will demonstrate further.⁷³ This coalition was formed with the intent to assure the preservation of sibling relationships between children in the New England child welfare system.⁷⁴ Case law discussing true progressiveness and sensitivity to the needs of these children requires a consideration of the panoply of factors that affect the best interests of each individual child, rather than a flat proclamation of an ideal based on nonempirical data.

III. STATUTES/FEDERAL PROGRAMS

Starting in the mid-1990s, states enacted most laws and policies with respect to placement of children into foster care. However, one of the

⁷⁰ *Id.* (citing CAL. WELF. & INST. CODE §16002). A positive innovation in California is the requirement that sibling interests be considered at each stage of the placement process. “California policy limits parental control over decisions regarding post-adoptive sibling contact by allowing siblings, not just their parents, to determine these decisions.” McCormick, *supra* note 5, at 204.

⁷¹ *Regional Youth and Foster Care Agencies Develop Siblings Bill of Rights*, THE FREE PRESS, July 5, 2012, <http://freepressonline.com/main.asp?SectionID=52&SubSectionID=78&ArticleID=20440>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

earliest acts addressing this issue was the Federal Adoption and Safe Families Act of 1997,⁷⁵ which made child safety an explicit focus in child welfare. This Act “was instrumental in increasing legislation addressing sibling issues at the state level.”⁷⁶

Through the mid-2000s, federal ideology proclaimed a near-universal proclamation that “[o]ne of the most crucial contributions that child welfare professionals can provide for children who enter care is to preserve their connections with their brothers and sisters.”⁷⁷ Contrary to the beliefs by many social workers that conflict or rivalry, special needs, an older child in a caregiving position, and age differences are valid reasons to keep siblings apart, federal policy often determined these factors *not* to be reasons to keep siblings apart.⁷⁸ While the US Department of Health and Human Services more recently moderated its stated preference for always keeping siblings in foster care together,⁷⁹ it continues to assert that “[w]hen siblings cannot be placed together, facilitating regular contact is critical to maintaining these relationships.”⁸⁰

The Fostering Connections Act (FCA)⁸¹ is the first piece of federal legislation specifically imposing a strong obligation on states to preserve sibling relationships. Specifically, the FCA requires that state child welfare agencies make reasonable efforts to place siblings in the same foster home and make efforts to maintain connections among siblings if the siblings are

⁷⁵ Adoptions and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

⁷⁶ See McCormick, *supra* note 5, at 200.

⁷⁷ U.S. DEP’T OF HEALTH AND HUMAN SERVICES, CHILD WELFARE INFO. GATEWAY, SIBLING ISSUES IN FOSTER CARE AND ADOPTION, 1 (2006) *available at* <https://www.childwelfare.gov/pubs/siblingissues/siblingissues.pdf>.

⁷⁸ *Id.* at 6.

⁷⁹ *Id.* at 2. The stated purpose of this bulletin is to “explore research, intervention strategies, and resources to assist professionals in preserving connections among siblings.” *Id.*

⁸⁰ *Id.* at 12.

⁸¹ Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949.3949.

not placed together unless it would be contrary to their safety and well-being to do so.⁸² The FCA also imposes a strong obligation on the states to ensure that visitation between siblings occurs while they are in foster care as well as afterward.⁸³

However, not all federal programs deny the reality that the separation of brothers and sisters may at times be justified. The Child Welfare League of America, a coalition of public and private child welfare service providers, states that “[s]iblings should be placed together both in out-of-home care and adoption unless the serious, specific needs of one or more of the siblings justifies separation. The decision to separate siblings should be based on a carefully documented and reviewed determination that such separation is necessary.”⁸⁴ Further, it notes, “in completing assessments, it is important to recognize that sibling relationships vary greatly in both positive and negative qualities.”⁸⁵

A. Courts Have Found No Constitutional Right to Sibling Relations

Although state and federal policies often treat the preservation of sibling relationships as an imperative, “children have never been found to have a constitutional right, not to mention a fundamental right, to their sibling relations.”⁸⁶ We summarize below a sampling of cases that involved constitutional claims related to siblings.⁸⁷ In 1977, a federal court in the Second Circuit held that there is no constitutional obligation to ensure

⁸² *Id.* at § 206(3) (codified at 42 U.S.C. § 671(a) (31)).

⁸³ *Id.* (codified at 42 U.S.C. § 671(a)(31)(B)).

⁸⁴ U.S. DEP’T OF HEALTH AND HUMAN SERVICES, CHILD WELFARE INFO. GATEWAY, SIBLING ISSUES IN FOSTER CARE AND ADOPTION, *available at* <http://www.camptobelong-ga.org/pdf/siblingissues.pdf> (citing Standard 3.7 of Child Welfare League of America (CWLA) Standards of Excellent for Adoption Services (2002)).

⁸⁵ *Id.*

⁸⁶ Mandelbaum, *supra* note 34, at 58 (internal citations omitted).

⁸⁷ NAT’L RESOURCE CTR FOR FAMILY-CENTERED PRACTICE & PERMANENCY PLANNING, *supra* note 47.

children with a “given type of family life.”⁸⁸ In 1984, the Seventh Circuit Court of Appeals denied plaintiff children the right to seek compensation in a civil rights suit for damages to a sibling relationship.⁸⁹ In 1989, a federal district court held that children who had been removed from their homes had no Fourteenth Amendment due process right to sibling visitation.⁹⁰ In 1998, a court in Massachusetts refused to recognize a presumption in favor of maintaining a sibling relationship after parental rights were terminated.⁹¹

B. The Presumption of Placing Siblings Together Fails Some Children: A Case Study

Although some children benefit from policies prioritizing preservation of sibling relationships, there are situations where these policies hurt children. While positive aspects of sibling relationships may be true, particularly for brothers and sisters in well-functioning families, many children in foster care are there because they come from struggling families, and some children in the foster care system may have been maltreated either by adults in the family or by others – including siblings. In 1980, one study

⁸⁸ *Black v. Beame*, 419 F.Supp. 599, 607 (S.D.N.Y. 1976), *affd.*, 550 F.2d 815 (2d Cir. 1977). In this case, a mother voluntarily placed four of her children in foster care, while five of her children remained in her home. *Id.* at 602. The District Court dismissed the nine children’s suit claiming the State had failed to allow them to maintain sibling and familial relationships, holding that there is no constitutional protection to keep the family together, particularly as the state did not “interfere” in this family’s life. *Id.* at 605–10.

⁸⁹ *Bell v. City of Milwaukee*, 746 F.2d 1205, 1243–49, (1984). The court expressly refused to attach constitutional significance to the sibling relationship stating “[t]he relationship between a parent and its offspring and the relationship between brother and sibling is not a difference in degree; it is a difference in kind.” *Id.* at 1247–48 (quoting *Sanchez v. Marquez*, 457 F.Supp. 359, 363 (1978)).

⁹⁰ *See B.H. v. Johnson*, 715 F. Supp. 1387, 1397 – 98 (N.D. Ill. 1989).

⁹¹ *Adoption of Hugo*, 700 N.E.2d 516, 524 (Mass. 1998). The court held that the sibling relationship is just one factor in determining the best interests of the child and is not entitled to any special status. *Id.*

discovered that 80 percent of siblings ages three to 17 had experienced one or more violent episodes in the preceding year.⁹²

While cases claiming a constitutional right to sibling relationships have been unsuccessful, cases claiming damages for one sibling's abuse of another offer further instruction about the legal implications of sibling relationships. In one such case, a four-year-old girl (Jane) and her eight-year-old brother (Kameron), both victims of sexual abuse by adult relatives (their mother's boyfriend and their maternal grandfather), ended up in foster care where Jane was sexually abused by Kameron.⁹³ Therapists and others in the employ of the State were aware of the danger to Jane, but insisted that the siblings should be placed together if at all possible. Kameron was hospitalized for psychiatric reasons, but the children were reunited in foster care. A couple who was willing to accept children with "mild/treatable" sexual abuse but not children who were "sexually aggressive" completed an application to adopt Jane and Kameron with the understanding that the children were in the system because of abuse and neglect.

The couple halted their adoption of Kameron after they came to believe he had inappropriately touched the couple's biological son. About one year later, Kameron admitted that he had sexually abused Jane and seven other children while in foster care (both before and after his placement with this couple). Jane's behavior significantly deteriorated, and she could not be left alone with other children due to her aggression – both physical and sexual. The adoptive couple sued the State Department of Social Services on Jane's behalf, arguing that the social services worker had violated Jane's

⁹² Hegar, *supra* note 18, at 448 (citing Murray Straus, Richard . Gelles, and Susan K. Steinmetz, *Behind Closed Doors: Violence in the American Family* (Garden City, N.Y.: Anchor, 1980)).

⁹³ *Doe ex rel. Johnson v. South Carolina Dep't of Soc. Serv's*, 597 F.3d 163, 166–68 (4th Cir. 2010).

substantive due process rights under the Fourteenth Amendment⁹⁴ by placing her in foster care with her brother when the worker knew that he was sexually abusive towards her. The couple also alleged that its own substantive due process rights were violated when the social services agency failed to fully disclose the sexual history of Jane and Kameron prior to Jane's adoption.⁹⁵ The Fifth Circuit Court of Appeals granted summary judgment to the social services worker on the basis that she was entitled to qualified immunity⁹⁶ from the civil rights claims.⁹⁷

The facts of this case demonstrate how the presumption that sibling relationships should be preserved in all situations does not always protect the best interests of children. This presumption must be reexamined in order to protect the best interests of all children, not only children with healthy sibling relationships.

Despite the reluctance of courts to afford constitutional or other inviolate rights to sibling relationships, policymakers both nationally and in the states have overwhelmingly clung to the presumption that siblings should be kept

⁹⁴ *Id.* at 168. While we previously have noted that courts have not found a constitutional right to sibling relationships, several other constitutional rights can be invoked in the context of foster care. As in *Doe ex rel. Johnson*, a plaintiff may make a civil rights under 42 U.S.C. § 1983 (2011) by alleging the violation of a constitutional or federal statutory right. *See, e.g., Wendy H. ex rel. Smith v. Philadelphia*, 849 F.Supp. 367, 369–71 (E.D. Pa. 1994) (another sibling case in which a child had been sexually abused in the past by her brother, and the social worker placed the siblings together in foster homes where the abuse continued).

⁹⁵ *Id.* For an examination of the extent to which information about foster children should be proactively given to foster parents, see Daniel Pollack, *The Need for a Consensus Standard of Care in Screening Prospective Adoptive, Foster, and Kinship Placements*, 40 CAP. U.L. REV. 397 (2012).

⁹⁶ *Id.* at 177. Qualified immunity generally shields government officials performing discretionary functions from individual liability for civil damages under 42 U.S.C. § 1983 (2011) “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

⁹⁷ For an analysis of how qualified immunity protects social workers from such lawsuits, see Karen Rothschild & Daniel Pollack, *When Qualified Immunity Protects Social Workers from 42 U.S.C. § 1983 Lawsuits*, 20 ASPAC ADVISOR 7 (2008).

together at almost all costs. Why is this? Perhaps many of the people analyzing and making policy have been part of functioning families and personalize the value and support that they realize in their own sibling relationships. Sibling relationships are recognized as an integral part of childhood and continued development.⁹⁸ Siblings can function as buffers during adverse circumstances and can provide each other with comfort and a sense of continuity.⁹⁹

A recent study was written from the perspective of exploring “the ameliorating effects that sibling connections can have on feelings of anxiety, trauma, grief, guilt or loss of identity that children who enter the child welfare system may experience.”¹⁰⁰ There have been other studies that have demonstrated positive influences when siblings with healthy relationships are kept together, such as aiding children in social and emotional development.¹⁰¹

While studies of children out of foster care indicate significant benefits from sibling relationships, existing research on siblings in foster care is limited. Little is known about the predictors of intact sibling placement or the consequences of these placements. The few studies to date are limited by their design or sample size and have not controlled the interaction between factors that affect intact sibling placement.¹⁰²

⁹⁸ Shlonsky et al., *supra* note 65, at 28 (citing VICTOR G. CICIRELLI, *SIBLING RELATIONSHIPS ACROSS THE LIFESPAN*, (Springer, 1995)).

⁹⁹ Herrick & Piccus, *supra* note 13, at 851 (internal citations omitted).

¹⁰⁰ *Id.* at 845 (internal citations omitted).

¹⁰¹ See Shlonsky et al., *supra* note 64, at 29 (citing Judy Dunn, *Siblings and the Development of Social Understanding in Early Childhood*, in *SIBLING INTERACTION ACROSS CULTURES: THEORETICAL AND METHODOLOGICAL ISSUES* 106 (Patricia Goldring Zukow, ed., Springer-Verlag 1989); Brenda K. Bryant, *The Child's Perspective of Sibling Caretaking and its Relevance to Understanding Social-Emotional Functioning and Development*, in *SIBLING INTERACTION ACROSS CULTURES: THEORETICAL AND METHODOLOGICAL ISSUES* 143 (Patricia Goldring Zukow, ed., Springer-Verlag 1989); CICIRELLI, *supra* note 98).

¹⁰² Shlonsky, *supra* note 64, at 32.

Nonetheless, legislation has become more insistent upon the maintenance of sibling ties.¹⁰³ For example, HHS wrote in 2006 that “for children entering care, siblings can serve as a buffer against the worst effects of harsh circumstances. Therefore, it is especially important to protect these ties that offer support to children removed from their original families”¹⁰⁴ Additionally, policymakers credit preservation of sibling relationships with helping children maintain continuity of relationships and senses of identity in the face of major separations and losses.¹⁰⁵ Sadly, society is often forced to take a hard look at its legal expectations only when lawsuits are filed and is only then compelled to acknowledge that there may be a very real distinction between child welfare’s “best practice” standard and the legal standard of care.¹⁰⁶

IV. PSYCHOLOGICAL AND BEHAVIORAL STUDIES AND THEORIES OFFER GUIDANCE ON BETTER ASSESSING THE CHILD’S BEST INTEREST

A psychotherapist working in an urban outpatient behavioral health clinic reported his experience with cases involving sexual abuse between older and younger siblings. He wrote that the children were referred for psychotherapy with the expectation that the therapy would lead to reunification of the offender and the victim. He noted that “the unquestioned assumption was that the siblings would be better in the long run if they could be reunified, and the ‘system’ will have failed the children if this reunification did not occur. This assumption needs to be questioned.”¹⁰⁷

¹⁰³ *Id.* (internal citations omitted).

¹⁰⁴ CHILD WELFARE INFORMATION GATEWAY, *supra* note 80, at 4-5. *Sibling Issues in Foster Care and Adoption*, Dec. 2013, pp. 4-5.

¹⁰⁵ Hindle, *supra* note 2, at 72.

¹⁰⁶ Daniel Pollack, *The Need for a Consensus Standard of Care in Screening Prospective Adoptive, Foster, and Kinship Placements*, 40 CAP. U.L. REV. 397 (2012)

¹⁰⁷ Whelan, *supra* note 8, at 22-23.

It is an unfortunate reality that children are placed into foster care because things are not going well in the family home. And, sadly, these children may be victims of sexual abuse, often but not always at the hands of adults. Sometimes siblings abuse their brothers or sisters. Incest is a taboo subject, and it is not surprising that little attention has been paid to this problem. When considering legal and policy strictures regarding the placement of children into the foster care system, child welfare providers/policymakers should look beyond the niceties and should stop assuming that all sibling relationships are healthy, supportive, and advisable.

A. Westermarck Theory

The Westermarck Theory looks at the incidence of incest among siblings and “maintains that incest avoidance arises from the physical proximity of siblings during a critical period of early childhood,” which “gives rise to an inhibiting effect on post-childhood sexual interest.”¹⁰⁸ The Westermarck Theory suggests that the critical period of inhibition of sexual interest is during the first four years of childhood. Proponents of the Westermarck Theory believe that the theory should be used to justify placing siblings together during their first four years of childhood in order to reduce the likelihood of post-childhood sibling incest occurring between the siblings after childhood.¹⁰⁹ The theory holds that “as siblings enter adolescence and adulthood, they are not interested in sexual relations with each other because of the time they spent together during early childhood.”¹¹⁰

¹⁰⁸ Herring, *supra* note 6, at 1145.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1147.

A study based on the Westermarck Theory, conducted by Bevc and Silverman,¹¹¹ tested the hypotheses that separation during early childhood corresponds to a higher frequency of genital intercourse, but not to a higher frequency of other sexual activity between biologically-related, opposite sex siblings; and also that the extent of day-to-day proximity and intimacy between siblings during early childhood correlates negatively to post-childhood incest. Bevc and Silverman's survey instrument focused on the subjects' experiences from ages one to ten.¹¹² Bevc and Silverman found that "early sustained cohabitation between siblings operates as a barrier specific to potentially reproductive acts rather than as a general suppressor of sexual interest."¹¹³ The study's data support the concept of a critical period that terminates at age three.¹¹⁴ Bevc and Silverman caution that separate placement "in foster care during the critical period of early childhood may disrupt the sustained cohabitation that gives rise to sexual inhibition between opposite sex siblings."¹¹⁵

B. Attachment Theory

Attachment theory also offers insight into the potential harms versus potential benefits of placing siblings together. Attachment theory offers a useful mode for determining whether siblings removed from their birth parents' home and awaiting placement should remain together or should be separated when placed in foster care.¹¹⁶ Attachment theory is a developmental theory, which emphasizes that the child's primary drive is to

¹¹¹ Herring, *supra* note 6, at 1154 (citing Irene Bevc & Irwin Silverman, *Early Separation and Sibling Incest: A Test of the Revised Westermarck Theory*, 21 EVOLUTION & HUM. BEHAV. 151 (2000)).

¹¹² Herring, *supra* note 6, at 1155 (internal citations omitted).

¹¹³ *Id.* at 1158.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1161.

¹¹⁶ Whelan, *supra* note 8, at 21.

develop an attachment relationship to a primary caregiver for protection.”¹¹⁷ However, attachment theory may also be offered as a means to formulate a decision that allows clinical social workers not only to consider the issue of child protection, but also to ponder the other considerations of child welfare, such as the emotional and developmental needs of the children in the sibling set.¹¹⁸ Naturally, siblings can potentially contribute to or detract from a secure attachment environment. Attachment theory is based on the premise that a child engages in an attachment relationship for protection. “Children look to primary caregivers to protect them from harm. Accordingly, if the worker and the foster parent cannot provide an environment that counteracts the historical abusive relations between the siblings, the children are better off separated.”¹¹⁹

When siblings are supportive of each other, they can contribute to building a secure and safe environment in which healthy attachments can flourish; however, when the “sibling [sic] relationships are chronically abusive, the individual siblings within a sibling set are precluded from achieving a secure attachment environment. In these cases the need for separation of the siblings is indicated and must be considered.”¹²⁰

C. Studies of Siblings in Foster Care Provide Further Guidance for Child Welfare Providers

We briefly review several other studies and theories that may help in deciphering what is truly in the best interest of siblings in foster care. However, these conclusions are necessarily subjective and dependent on interpretation by adults who may or may not believe what the children

¹¹⁷ *Id.* at 23 (internal citation omitted).

¹¹⁸ *Id.* at 23.

¹¹⁹ *Id.* at 30.

¹²⁰ *Id.* at 21.

report and who attribute their own perceptions to the truth of what the children are saying.

An older study (1976) found some interesting—and not that surprising—demographic differences between children who were placed with their siblings and those who were not placed with their brothers and sisters. The study reported that “[t]hose placed with siblings tended to be younger, female, and to exhibit fewer behavioral problems.¹²¹ Further, sibling placements tended to occur more often if there was a larger perceived chance of family reunification.”¹²² Additionally, that study concluded that “siblings were more likely to be placed together if they came from higher functioning families.”¹²³ It is interesting to note that “caseworkers ranked ordered behavior problems (36 percent) and lack of placement resources (33 percent) as the most important reasons for separating siblings.”¹²⁴ It is not contrary to consider that there are more behavior problems exhibited by children from abusive or otherwise poorer functioning families.

Several factors seem to significantly affect how siblings are placed into foster care and whether they are kept in an intact sibling group or split. These factors include the age (and age ranges of the siblings), the gender of the siblings, the size of the sibling group, and where the sibling group is placed (in state-run or kinship placements). Other combinations of attributes (including sexual abuse) were mostly “adjustments to these major factors.”¹²⁵

¹²¹ Shlonsky, *supra* note 64, at 30 (internal citations omitted) (citing to Aldridge and Cautley (1976)).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Sonya J. Leathers, *Separation from Siblings: Associations with Placement Adaptation and Outcomes Among Adolescents in Long-term Foster Care*, 27 CHILD AND YOUTH SERVICES REV. 793, 807 (2005).

¹²⁵ Shlonsky, *supra* note 64, at 44.

1. Age Span and Age of Individual Children

Age span is a highly influential factor. Children in sibling groups where the age span between the oldest and youngest was greater than four years have about half the odds of being placed all together than children with an age span between them of less than four years.¹²⁶ “It appears that, when children are separated, the very youngest are more often split apart from their older siblings.”¹²⁷

Among the factors most negatively associated with being placed with siblings include being age 13 or older and being the youngest member of a sibling group.¹²⁸ “Teenagers in foster care expressed the wish to be separated from siblings more often than younger children”,¹²⁹ and older children may be split from the sibling group since the specific needs of teenagers as compared to younger children can be an important motive for placing them in different living situations which are better able to accommodate them.¹³⁰

2. Gender

An analysis conducted on a large sample of children in two-member sibling groups found that “siblings who were paired with a sibling of the same gender had about 1.5 times the odds of being placed with their other sibling than pairs who were not matched on gender.”¹³¹ This finding was true for both male and female pairs.¹³² While gender pairs play a role in sibling placement, it is not clear whether this finding applies to sibling groups with more than two members.¹³³

¹²⁶ Shlonsky, *supra* note 64, at 42.

¹²⁷ *Id.* at 44.

¹²⁸ *Id.* at 46.

¹²⁹ McCormick, *supra* note 5, at 208–10 (internal citations omitted).

¹³⁰ Drapeau et al., *supra* note 16, at 83.

¹³¹ Shlonsky, *supra* note 64, at 43.

¹³² *Id.*

¹³³ *Id.* at 44.

3. Size of the Sibling Group

Another factor found to be a predictor of sibling placement is the sibling group size. Large sibling group size has an “overwhelming negative association with non-intact placement.”¹³⁴ “As sibling size increased, the likelihood of being placed with *all* siblings decreased and the likelihood of being placed with *some* siblings was improved.”¹³⁵ A child from a sibling group size of five had about 3 times the odds of being placed with *some* siblings than a child with only one sibling.¹³⁶ The study author concluded that one of the reasons for this was that the “child welfare workers may encounter difficulties when trying to find homes for larger sets of siblings despite the fact that they may have started care at the same time.”¹³⁷

4. Placement into the Foster Care System

The timing and circumstances of when the siblings are placed into the foster care system are additional important factors in determining whether the sibling groups are placed together. “The most positively associated factors with being placed with all siblings were starting care at the same time and a current placement of shelter care, kinship care, or guardianship.”¹³⁸ “Siblings who entered the foster care system within 30 days of each other had almost four times the odds of residing together than children who entered care at different times.”¹³⁹

In addition to the timing and circumstances surrounding the placement, the type of placement is important. One study report described a prospective study of 156 maltreated children in which the children studied were placed into three groups: continuously together; continuously apart; and “disrupted

¹³⁴ *Id.* at 42.

¹³⁵ *Id.* at 44.

¹³⁶ *Id.*

¹³⁷ *Id.* at 42.

¹³⁸ *Id.* at 44.

¹³⁹ *Id.* at 41.

placement[,]” which was defined as siblings placed together who were then separated.¹⁴⁰ The goal of the prospective study was “to examine sibling relationship quality and the outcomes of children who were kept with their siblings and those who were separated from their siblings, and to distinguish those with a stable arrangement from those who were initially placed together and later separated.”¹⁴¹

The researchers found that “compared to siblings in continuous placement (either together or apart), siblings in disrupted placement with high initial behavior problems were rated as having fewer problems at follow-up, while siblings in disrupted placement with low initial behavior problems were rated as having more problems at follow-up.”¹⁴² These findings highlighted the importance of considering relationships between siblings and the risk that one poses to another before early placement decisions are made.¹⁴³

5. Balance of Pragmatism and Equity

A United Kingdom study used a phenomenological approach to study the judgment making, looking in-depth at the way in which judgments were made in sibling groups with four or more children to try to establish the essence of judgment making.¹⁴⁴ The researchers “focused upon the extent to which the judgments were dominated by pragmatism, or by the concept of equity.”¹⁴⁵

¹⁴⁰ L. Oriana Linares, MiMin Li, Patrick E. Shrout, Gene H. Brody & Gregory S. Pettit, *Placement Shift, Sibling Relationship Quality, and Child Outcomes in Foster Care: A Controlled Study*, 21 J. OF FAM. PSYCHOTHERAPY 736, 736 (2007).

¹⁴¹ *Id.* at 737.

¹⁴² *Id.* at 736.

¹⁴³ *Id.*

¹⁴⁴ Anne Hollows & Peter Nelson, *Equity and Pragmatism in Judgment-Making About the Placement of Sibling Groups*, 11 CHILD AND FAM. SOC. WORK 307, 307 (2006).

¹⁴⁵ *Id.* at 308.

In one case, they concluded that four children grew to adulthood with “no adverse consequences arising from their parents’ continuing heroin use.”¹⁴⁶ After some years, four more children were born. “Long-term social work support with the second group of four children had been designed to restore [the] mother to the level of ‘good enough parenting’ that she had shown for the first four.”¹⁴⁷ One should question whether we should aim higher than striving for “good enough” as a standard.

In another case studied by these same researchers, the children in another family mixed up in heroin were “removed following increasing concern regarding neglect and alleged sexual abuse of the girls by extended family members related to the mother, and also involve[ed] the oldest boy as both a perpetrator and victim.”¹⁴⁸ Concerns about sexual abuse and involvement of the boy led to the conclusion that he had to be placed separately *in the short term*. There is an inherent, unquestioned presumption that the goal was reunification in the near term.

The researchers saw that the balance between equity and pragmatism required a “value base of promoting the rights of the sibling group to retain its identity” with the researchers concluding the following: “It challenges us to think about the best arrangements for children – and by this we mean the most equitable – rather than the least bad.”¹⁴⁹ But the rights of minors are not inalienable, and children lack the perspective that adults do – which is why adults can place them elsewhere. We should also be challenged to sometimes place the best interests of children above what is most equitable, what is most favorable from the standpoint of what we wish for, or what is most acceptable within societal norms.

¹⁴⁶ *Id.* at 310.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 312.

¹⁴⁹ *Id.* at 314–15.

6. Sexual Abuse

Despite continuing improvements in risk assessment for child protective services (CPS) and movement toward actuarial prediction of child maltreatment, current models have not adequately addressed child sexual abuse. Sexual abuse cases present unique and ambiguous indicators to the investigating professional, and risk factors differ for those related to physical abuse and neglect.¹⁵⁰

Unlike physical abuse and neglect cases in which injuries may be evident, “sexual abuse cases present unique and ambiguous indicators to the investigating professional.”¹⁵¹ It is noteworthy that one study reported that “sexual risk posed by one sibling to other was mentioned for 6 percent of the children” studied.¹⁵²

The authors of a literature review of studies of sexual abuse cases involving children proposed risk assessments be conducted using an evidence-based model for assessing risk in child sexual abuse cases.¹⁵³ The authors found that, generally, child protective services agencies “are the entry point through which [sexual abuse cases] are reported, investigated, and referred for intervention.”¹⁵⁴ The authors determined that “risk factors have been found to fall into several broad categories, including child characteristics, parental characteristics, environmental factors, and parent-child interactions.”¹⁵⁵ They also pointed out that indicators most commonly assessed in child protective service investigations may be misleading in sexual abuse cases.¹⁵⁶ For instance, factors such as lower social class,

¹⁵⁰ Jill S. Levenson & John W. Morin, *Risk Assessment in Child Sexual Abuse Cases*, 85 CHILD WELFARE 59, 63 (2006).

¹⁵¹ *Id.*

¹⁵² Leathers, *supra* note 124, at 807.

¹⁵³ Levenson & Morin, *supra* note 150, at 59.

¹⁵⁴ *Id.* at 60.

¹⁵⁵ *Id.* at 61.

¹⁵⁶ *Id.* at 64.

alcohol or substance abuse, low intelligence and poor social skills are often used by caseworkers.¹⁵⁷ However, the authors suggested that “these uncorrelated factors are particularly significant, because a CPS caseworker interviewing an alleged perpetrator may be potentially biased by clients who present as intelligent, middle class, non-addicted, and generally well-adjusted—all characteristics that are statistically unrelated to reoccurring sexual abuse.”¹⁵⁸

They concluded that “[w]henver child sexual abuse is confirmed, the sexual abuser should not be allowed to reside with children.”¹⁵⁹ They seem to be making an assumption that the perpetrator is always an adult, but this proposition should be equally valid to support the conclusion that minor perpetrators of sexual abuse against their siblings should also be placed away from their siblings. The authors noted that “incestuous offenders under 25 who molested younger siblings, cousins, or other family members had the highest rates of recidivism.”¹⁶⁰ The variables they found most predictive of recidivism included the child’s age and vulnerability and the perpetrator’s access to the child. They found that these factors were often used by case workers in consensus-based risk assessment models “in which workers assess client characteristics . . . and then exercise their own clinical judgment about the risk of future abuse or neglect.”¹⁶¹ One researcher found, however, that even “when [protective services workers] received instruction in using consensus-based risk assessment systems, in the field they primarily relied on their own experience, intuition, and interviewing skills.”¹⁶² However, the paper noted that many researchers “have expressed

¹⁵⁷ *Id.* at 64–65.

¹⁵⁸ *Id.* at 65.

¹⁵⁹ *Id.* at 68.

¹⁶⁰ *Id.* at 72 (internal citations omitted) (citing Hanson, R.K. 2002 *Recidivism and Age: Follow-up Data From 4,673 Sexual Offenders*, JOURNAL OF INTERPERSONAL VIOLENCE 27(10), 1046–62).

¹⁶¹ Levenson & Morin, *supra* note 150, at 61.

¹⁶² *Id.*

concern that consensus-based instruments generally demonstrate poor reliability and validity.”¹⁶³

An HHS report¹⁶⁴ briefly addresses the issue of what to do when a sibling is abusive. Its authors make a distinction between sexually reactive behavior defined as inappropriate sexual touching or fondling between children close in age, and sexual abuse by a more powerful sibling of another.¹⁶⁵ They note that physical aggression within the normal range of sibling relationships needs to be differentiated from physical abuse or victimization of a weaker sibling.¹⁶⁶ Victimization of one sibling by another should not be ignored.

Research indicates that the impact of sexual abuse by a sibling is just as harmful to the victim as sexual abuse by a parent or stepparent. In fact, one study found that penetration occurred more commonly in sibling incest (71 percent) than in incest between a father or stepfather and a child (35 percent).¹⁶⁷

All that said, the document concludes that “it may be possible to work toward reunification after a period of treatment for the offending sibling.”¹⁶⁸ Again, it is stated in federal policy that the ultimate goal is to keep siblings together, which is in stark contrast to the government’s attitude towards adult sexual offenders, who must register; and if they molested a child, they are not permitted to be near schools or children.

V. CONCLUSION

Siblings become a part of the caretaking experience for one another. Siblings can promote a secure caretaking environment

¹⁶³ *Id.*

¹⁶⁴ U.S. DEP’T OF HEALTH AND HUMAN SERV., CHILD WELFARE INFO. GATEWAY, *supra* note 77, at 11–12.

¹⁶⁵ *Id.* at 11.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 12 (internal citations omitted).

¹⁶⁸ *Id.*

and/or they can perpetuate an insecure caretaking environment. The nature of these relationships becomes an important factor in assessing the family's functioning when determining placement needs of children going into foster care.¹⁶⁹

"The consideration of the sibling incest studies in the context of foster care placements may provide a powerful and focused justification for the placement together of certain types of sibling groups."¹⁷⁰

"For social workers assessing a sibling-set for placement in foster care, understanding how the siblings effect each other's care-taking environment will lead to improved decision making when determining whether siblings should remain together or be separated."¹⁷¹ Social workers can use the concepts provided by the attachment theory to determine whether or not the sibling-set should be kept intact or separated. Suggested salient questions social workers could use in making those determinations are the following: "1) Will placing the siblings together contribute to a secure caregiving environment? 2) Will placing the siblings together have a neutral effect on the security of the care giving environment? or 3) Will placing the siblings together detract from a secure caregiving environment?"¹⁷²

"When a worker is faced with a sibling-set, within which there is a history of emotional, physical or sexual abuse between the siblings, the worker may determine that it is in the children's best interests to be separated."¹⁷³ An assessment should include an examination of children's individual needs; an investigation of the children's understanding of what happened to their family and the child's wishes; and a determination of the dynamics of the sibling groups, using attachment and other theories to inform of exceptional circumstances that may indicate that siblings should

¹⁶⁹ Whelan, *supra* note 8, at 2828.

¹⁷⁰ Herring, *supra* note 6, at 1171.

¹⁷¹ Whelan, *supra* note 8, at 29.

¹⁷² *Id.*

¹⁷³ *Id.* at 29–30.

be placed separately, such as intense sibling rivalry, or possible sexual involvement.¹⁷⁴

When making determinations of sibling placement, we should remember that “even if siblings have an apparently shared environment, ‘experience may impinge differently on different siblings because of differences in personality, age or expectations.’”¹⁷⁵ Further, there is “a need to consider the *cumulative* impact of events on children and the need to differentiate the impact on each child.”¹⁷⁶

The time has come to question whether the old presumption that it is best to always keep siblings together in foster care is just or effective in determining the best interest of the child. “Most of the available studies that address questions related to sibling separation are quite old and have methodological limitations.”¹⁷⁷ Further, another component missing from the research definitions of siblings is who the children actually perceive to be their siblings. Other problems with older studies include modeling individual and group-level effects complicated by the fact that children from the same family might enter care at different times, be placed in homes together at different points and then be separated, never be placed together, or never even live together.¹⁷⁸ An additional factor that has not been acknowledged in research concerns the role of a child’s developmental stages in influencing a child’s reaction to separation. As with all relationships, with time and experience, sibling relationships develop, transform, deepen, or drift apart.¹⁷⁹

It is also time to question additional assumptions. For example, there has been an assumption that placing siblings together will increase reunification

¹⁷⁴ Herrick & Piccus, *supra* note 13, at 854–55.

¹⁷⁵ Hindle, *supra* note 2, at 76.

¹⁷⁶ *Id.*

¹⁷⁷ Leathers, *supra* note 124, at 797.

¹⁷⁸ *Id.* at 798.

¹⁷⁹ *Id.* at 799.

rates, while it has been found that the two are unrelated. Children placed with the same number of siblings consistently throughout foster care had higher chances for adoption than those placed alone.¹⁸⁰ Better adaptation and more positive outcomes were associated with consistency of placement with siblings, rather than the number of siblings placed together.¹⁸¹

“Although practice guidelines support maintaining sibling ties in order to preserve family attachments and provide support to children in care, little research has systematically investigated how separation from siblings affects foster children.”¹⁸² It is time to take a hard look at our policies and practices, and see if they are truly working to protect the children, or if they have been set because of societal norms and expectations. We have demonstrated that the research is not clear-cut and that the desires of children should be taken into consideration. Further, when social workers and policymakers think that it would be in the children’s best interest to be placed in separate foster homes, they should not be made to feel they are failing because not all sibling-sets should remain together.

¹⁸⁰ *Id.* at 810.

¹⁸¹ *Id.*, at 812–14.

¹⁸² *Id.*, at 795.